IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-947

STATE OF NEW YORK, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York and ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Petitioners
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3446

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Constitutional Provisions Involved	10
Statement of the Case	11
Reasons for Granting Writ	33

APPENDIX:

Exh. A—Judgment and Order of the United States Court of Appeals, dated November 13, 1978	1a
Exh. B—District Court Memorandum and Order, dated March 23, 1978	5a, 8a
Exh C.—Order of the New York Court of Appeals permitting Local 1115 to withdraw its appeal to that Court from the order of the New York Appellate Division entered upon the opinion reported at 56 A D 2d 310 (2nd Dept., March 14, 1977), pursuant to stipulation that Local 1115 pays costs	9a

TABLE OF AUTHORITIES

Allen-Bradley Locals v. *Wisconsin Emp. Rel. Board*, 315 U.S. 740 (1942)	38
A. L. Mechling Barge Lines v. *United States*, 368 U.S. 324 (1961)	41
Arnold Co. v. *Carpenters*, 417 U.S. 12 (1974)	13

PAGE

Automobile Workers v. *O'Brien*, 339 U.S. 454 (1950) 27

Barclay's Ice Cream Co. v. *Local 757*, 41 NY2d 269 .. 17

Boys Markets v. *Clerks Union*, 398 U.S. 235 (1970) .. 13

Chicago & S. Airlines v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) 40, 41

City of Chicago v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958) 3

City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) .. 3

Clark v. *Valeo*, 559 F.2d 642 41

De Gregory v. *New Hampshire Attorney General*, 383 U.S. 825 (1966) 39

Dowd Box Co. v. *Courtney*, 368 U.S. 502 (1962) 13

Farmer v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 97 S. Ct. 1056 (1977) 27, 35, 36

Golden v. *Zwickler*, 394 U.S. 103 (1969) 42

Lamb Enterprises v. *Kiroff*, 549 F. 2d 1052 (6th Cir., 1977) 40

Marine Engineers Beneficial Ass'n v. *Interlake S.S. Co.*, 370 U.S. 173 (1962) 2

Mitchum v. *Foster*, 407 U.S. 225 (1972) 28

Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971) 39

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 13

N.L.R.B. v. *Nash-Finch Co.*, 404 U.S. 138 (1971) ..4, 28, 34, 35, 39

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 42

PAGE

People v. *Epton*, 19 NY 2d 496 (1967), app. dism. 390 U.S. 29 (1968) 39

Railroad Trainmen v. *Terminal Co.*, 394 U.S. 369 (1969) 13

Rizzo v. *Goode*, 423 U.S. 326 (1976) 42

San Diego Unions v. *Garmon*, 359 U.S. 236 (1959) ..13, 27, 34, 35, 37

Sears-Roebuck & Co. v. *San Diego Council of Carpenters*, 436 U.S. 180 (1978) 4, 12, 35, 36, 37, 38 39

Sinclair Refining Co. v. *Atkinson*, 370 U.S. 195 (1962) 13

State of New York v. *Local 1115 Joint Board*, 56 A.D. 2d 310 (March 14, 1977) 2, 3, 12, 13, 14, 15, 16, 17, 21, 23, 24

State of N.Y. v. *1115 J. Bd., N.H. & H.E.D.*, 412 F. Supp. 720 .....21, 22

Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 13

United States v. *California*, 381 U.S. 139 (1965) ... 23

Virginian Ry. v. *Federation*, 300 U.S. 515 (1937) 14

Washington Metropolitan Area Transit Authority v. *Amalgamated Transit Union*, 531 F. 2d 617 (D.C., 1976) 31

Youngdahl v. *Rainfair, Inc.*, 355 U.S. 131 (1957) 13

STATUTES CITED

New York Constitution:

Article XVII, § 3 10

United States Constitution:

Article VI, Clause 2 10

Tenth Amendment 11

PAGE

28 U.S.C. § 1254(1) 2
§ 2201 24
§ 2202 24

29 U.S.C. § 152(14) 27
§ 157 3
§ 158 ..... 3, 27

New York Public Health Law:
§ 12 Subd. 5 4
§ 16 ..... 4, 5
§ 206 5
§ 2800 5

National Labor Relations Act:
§ 7 28
§ 157 ..... 5, 6
§ 158 ..... 6, 7, 8
§ 183 ..... 8, 9, 10

New York State Labor Law:
§ 807 18

MISCELLANEOUS

1 C. Warren, The Supreme Court in United States History (Boston: rev. ed. 1926), 108-111 40

Wright, Law of Federal Courts (3d ed. 1976), § 106, p. 533, note 27 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

STATE OF NEW YORK, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York and ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which on November 13, 1978, affirmed an order of the United States District Court for the Eastern District of New York, dated March 23, 1978.

The Opinions Below

The Court of Appeals order and judgment of affirmance of the District Court judgment stated that it "affirmed

on the opinions of Judge Neaher dated August 23, 1977 and March 23, 1978." (Exh. A). It wrote no further opinion.

Judge Neaher's opinion of August 22, 1977 is reported at 436 F. Supp. 335. An earlier opinion by him on a remand motion made by the State is also reported at 412 F. Supp. 720. The March 23, 1978 opinion, which remains unreported, has been reproduced in our Appendix (Exh. B).

An opinion of the Appellate Division, Second Department in the related case of *State of New York* v. *Local 1115 Joint Board* is reported at 56 A D 2d 310 (March 14, 1977). The order of the New York Court of Appeals, permitting the Union to withdraw its appeal to that Court upon the payment of the State's costs, is reproduced in the Appendix (Exh. C).

Jurisdiction

The judgment sought to be reviewed was entered November 13, 1978. There was no petition seeking either a rehearing or an extension of time within which to petition for certiorari. Jurisdiction to review the judgment by writ of certiorari is conferred by 28 U.S.C. 1254(1).

We assert a conflict between the decision below and a state court decision relating to the exclusivity of jurisdiction of the National Labor Relations Board. The Court below usurped the State Court's function to determine the issue of preemption, in the first instance, subject to certiorari review by this Court, as in *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173 (1962).

Although the District Court purported to restrict its order in form to "preliminary" injunctive relief, the judgment which we seek to review has the effect of a final declaratory judgment particularly in view of the withdrawal of the Union's appeal to the New York Court of Appeals and the discontinuance of the State court litigation which gave rise to the institution of this action by the N.L.R.B. See *Wright*, Law of Federal Courts (3d ed. 1976, § 106, p. 533, note 27; *City of Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958); *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).

Questions Presented

1. Did the Courts below, after the District Court initially recognized that preemption was an issue to be addressed in the first instance by a State tribunal, improperly permit the N.L.R.B. and the nursing home employees union, acting in concert, to obtain a judgment which will prevent state officers from obtaining State Court determinations on the preemption issue in any future strike theatening the public safety?

2. Since the Union and the N.L.R.B. had collaborated in procuring the discontinuance of the State Court appeal by the Union from the order in *State* v. *Local 1115*, 56 A D 2d 310 (2nd Dept., 1977) and since the Union had discontinued its appeal, at its own request, from that decision, and since there was no longer any controversy pending in the State Courts, should the District Court, whose order the Court of Appeals summarily affirmed, have continued to exercise jurisdiction to determine a "case or controversy" which no longer existed; which may never redevelop in the same form; and should the District Court have granted an injunction which prevents a proper exercise of the power of the State Commissioner to protect the health and safety of New York residents in situations where federal agencies fail to do so?

3. As applied by the courts below, does the National Labor Relations Act (29 U.S.C. §§ 157, 158) unconstitutionally abrogate powers which have been reserved to the States under the Tenth Amendment; or would a frank

recognition of the vacuum, which exists in the congressional plan to establish an appropriate balance between union rights and the public safety, avoid the necessity for determining that constitutional issue?

4. Did the courts below fail to recognize the limitations placed upon the application of *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138 (1971) by this Court's decision in *Sears-Roebuck & Co.* v. *San Diego Council of Carpenters*, 436 U.S. 180 (1978)?

Statutes Involved

New York Public Health Law, § 12, Subd. 5, provides:

5. It shall be the duty of the attorney general upon the request of the commissioner to bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto; provided, however, that the commissioner shall furnish the attorney general with such material, evidentiary matter or proof as may be requested by the attorney general for the prosecution of such an action.

New York Public Health Law, § 16 provides, with reference to the powers of the State Health Commissioner:

§ 16. Summary action

Whenever the commissioner, after investigation, is of the opinion that any person is causing, engaging in or maintaining a condition or activity which in his opinion constitutes danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action for fifteen days until an opportunity for a hearing can be provided in accordance with the provisions of section twelve-a of this chapter, the commissioner shall order the person, including any state agency or political

subdivision having jurisdiction, by written notice to discontinue such dangerous condition or activity or take certain action immediately or within a specified period of less than fifteen days. As promptly as possible thereafter, within not to exceed fifteen days, the commissioner shall provide the person an opportunity to be heard and to present any proof that such condition or activity does not constitute a danger to the health of the people.

New York Public Health Law, § 206, directs the State Health Commissioner to

(a) take cognizance of the interests of health and life of the people of the state, and all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law.

Article 28 of the New York Public Health Law, all of which deals with "Hospitals", contains the following introductory sentence, in its "Declaration of policy and statement of purpose" (§ 2800):

Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health.

National Labor Relations Act, § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 158(a)(3) of this title.

National Labor Relations Act, § 158, *Unfair Labor Practices.*

By reason of the length of this section, *all* of which may be deemed applicable to the issues here involved, we shall reproduce only the most pertinent subdivisions (d) and (g). NLRA, § 158, subd. (d) provides:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of

a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) the notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract

period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

NLRA, § 158, subd. (g), provides:

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

NLRA, § 183 provides as follows:

§ 183. Conciliation of labor disputes in the health care industry—Establishment of Boards of Inquiry; membership

(a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to contniue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 158(d) of this title (which is required by clause (3) of such section 158(d) of this title), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

COMPENSATION OF MEMBERS OF BOARDS OF INQUIRY

(b) (1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General

Schedule under section 5332 of Title 5 including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

MAINTENANCE OF STATUS QUO

(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

AUTHORIZATION OF APPROPRIATIONS

(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

Constitutional Provisions Involved

The New York Constitution, Article XVII, § 3 provides:

§ 3. [Public health]

The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

Article VI, Clause 2 of the United States Constitution provides:

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The *Tenth Amendment* of the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statement

(1)

We seek to have this Court review the District Court judgment which was summarily affirmed by the Court of Appeals. It contains an *overbroad pronouncement* in the form of a *declaratory judgment*, that (8a)

> "State regulation of the right of nursing home employees to strike is preempted by the National Labor Relation Act, as amended, and is committed by Congress to the *exclusive* jurisdiction of the National Labor Relations Board." (Italics supplied)

We would regard as harmless the preliminary injunction provisions, designated (a), (b) and (c) of the District Court order which merely enjoin the defendants from regulating "the conduct of nursing home employees which is governed exclusively by the National Labor Relations Act and is within the exclusive jurisdiction of the National Labor Relations Board" (8a). *Conduct* which *is* exclusively within NLRB jurisdiction we are content to leave to its regulation.

The vice of the *declaratory judgment* portion of the District Court's directive is that it ignores this Court's decisions that Congress has not by the NLRA *entirely* excluded the States from all of their police power roles.

Although the District Court did not have the benefit of this Court's reasoning in *Sears-Roebuck & Co.* v. *San Diego Council of Carpenters,* 436 U.S. 180 (1978), that decision was called to the attention of the Court of Appeals, which, nevertheless, chose summarily* to rest upon the District Court's opinions. We shall request that this Court remand this matter to the Court of Appeals, to proceed in accordance with this Court's opinion herein and in the light of the *Sears* opinion.

The District Court deemed the procedural background of this case to have been "complex" (4a). We shall attempt to simplify it in the ensuing subdivisions of this statement.

(2)

The circumstances which led the New York State Commissioner of Health to invoke his powers to protect the lives and safety of more than 3,000 patients in nursing homes in two of New York's counties are set forth with great clarity in the opinion of Justice HOPKINS, in *State* v. *Local 1115,* 56 A D 310 (2d Dept., 1977). A *temporary* injunction order which merely ordered the employees of Local 1115 not to strike, but did not interfere with their right peacefully to picket, was there predicated upon the Health Commissioner's finding that the safety and lives of patients were affected adversely,

The Appellate Division in the Local 1115 case addressed itself primarily to the Union's argument that the State was *preempted* by the provisions of the National Labor Relations Act. By a three-to-two-vote, the Appellate Division concluded that Congress had *not* necessarily precluded the States from this "form of regulation" (56 A D 2d 310, 314).

---

* The Court of Appeals handed down its decision on the very same day our appeal to that Court was argued.

Justice HOPKINS, upon the authority of a plethora of this Court's decisions, concluded that the "doctrine of pre-emption does not foreclose State jurisdiction over labor disputes *altogether*" (56 A D 2d 310, 315). Holdings and reasoning in this Court's opinion relied upon by Justice HOPKINS included *San Diego Unions* v. *Garmon,* 359 U.S. 236, 245 (1959); *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131, 138 (1957); *Railroad Trainmen* v. *Terminal Co.,* 394 U.S. 369, 386 (1969); *National League of Cities* v. *Usery,* 426 U.S. 833, 845 (1976); *Arnold Co.* v. *Carpenters,* 417 U.S. 12, 18-20 (1974); *Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 511 (1962); *Boys Markets* v. *Clerks Union,* 398 U.S. 235 (1970); which he cited as overruling *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962). He also referred to *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 458 (1957), holding that the State jurisdiction exercised over actions arising out of breaches of labor contracts was not subject to the requirements of labor contracts. In a footnote to his opinion, Justice HOPKINS wrote (56 A D 2d 310, 317, fn. 2):

> "2. A recent law review note suggests that the doctrine of pre-emption should not bar the exercise of power by the States which they must use to carry out their functions as autonomous units within the Federal system (Municipal Bankruptcy, the Tenth Amendment and the New Federalism, 89 Harv L Rev 1871).
>
> On the question of the authority and jurisdiction of a State court to issue an injunction *pendente lite* despite a claim of pre-emption, see *Barclay's Ice Cream Co.* v. *Local 757* (41 NY 2d 269, 270), in which the Court of Apeals, in affirming an order granting an injunction *pendente lite;* held: 'We reject the proposition that under doctrine of pre-emption our State courts must defer in this case to the exclusive competence of the National Labor Relations Board and thus are powerless to protect against the unlawful

coercive activity designed by this union to erect an embargo on the flow of out-of-State goods into New York."

As Justice HOPKINS observed (56 A D 2d 310, 316):

"Moreover, in a larger sense, the demands of federalism impose a requirement that the States retain residual power under the Tenth Amendment to the United States Constitution to deal with local problems for the purpose of maintaining their sovereignty. . . ."

As to the greater impetus for equitable intervention, he emphasized the pervasive danger to the health of a substantial portion of the nursing home population and found authority for the exercise of the State Court's equitable powers in *Virginian Ry.* v. *Federation,* 300 U.S. 515, 552 (1937). Justice HOPKINS then wrote (56 A D 2d 310, 320):

"The State Commissioner had strong reason to seek injunctive relief, knowing the large number of patients involved, their own incapacity to care for themselves, the lack of suitable facilities to accommodate their transfer and the imminent deadline for the beginning of the strike. Nor was this the usual case where the parties sought the preferred remedy of arbitration—a remedy provided for in their contract. Though the contract, literally read, did not prohibit a strike when Nassau refused to pay the increase due the welfare fund, neither did the contract exclude arbitration of the dispute under the broad terms defining the subjects of arbitration, and the Local did not invoke the peaceful intervention of court process by suing Nassau for damages arising out of a breach of contract.

"It is not an answer that the Local filed an unfair labor charge with the regional office of the National Labor Relations Board and so invoked the jurisdiction

of the Federal Law. As we have seen, both State and Federal courts have initial jurisdiction in this field.[3] Besides this, the fact is that this record shows that the regional office, except for asking for a reply from Nassau, took no action in the dispute after the filing of the charges on or about December 19, 1975. The State Commissioner was thus in the untenable position of observing the dispute ripen into a strike without the intercession of either arbitration or conciliation or other governmental agency process.[4]

"The Federal statutes do not afford to the State an adequate avenue to obtain relief, and this factor is significant in the resolution of the question of preemption (see, note, Municipal Bankruptcy, the Tenth Amendment and the New Federalism, 89 Harv L Rev 1871). It seems clear that the process incorporated in the National Labor Relations Act would not have provided a quick and positive remedy to the situation facing the patients in the nursing homes."

In a footnote to this analysis, Justice HOPKINS stressed the following facts (56 A D 2d 310, 321, fn. 4):

"' The chronology was that the charge was filed on or about December 19, 1975; the reply of Nassau to the charge was requested by the regional office on December 30, 1975; the Attorney General moved for injunctive relief at Special Term on January 21, 1976, returnable on January 28, 1976; the court decided the motion on February 5, 1976; and the order of the court was not made until May 21, 1976. Special Term was required to and could only act upon the facts and exigencies which had been presented to it at that time. Our review of Special Term's determination must be in the context in which it was made, as shown in and limited by the record on appeal. The principal exigency, of course, was that more than 3,000 patients, many of them 'sickly and gravely ill and in need of

constant attention', faced immediate eviction from the facilities in which they were being cared for; that there were not sufficient facilities to which they might be transferred; and that neither the employers nor the union nor the National Labor Relations Board had sought court protection for the patients facing displacement in a health and life-endangering situation. It was into this hiatus that the State Attorney-General moved and Special Term acted. As for Federal preemption, we note that appellants' main brief states that the Federal unfair labor practice charges were tried before an Administrative Law Judge on June 22 and 23, 1976. It further appears, in a letter from appellants' counsel to this court, dated January 31, 1977, that at the time of the argument of this appeal, October 19, 1976, the Federal Administrative Law Judge had not yet rendered a decision; in fact, the decision was not rendered until November 18, 1976 and it was not until January 28, 1977 that the board adopted his decision, finding the employers guilty of unfair labor practices and directing them to cease and desist and to take specified affirmative action.

Insofar as it appears from the record and briefs, during the protracted period in which the unfair labor practice charges were pending before the board, the latter did not move to oppose or to vacate the temporary injunction issued by the State court which would indicate that the board was content to let the temporary injunction stand."

Indeed, in another footnote to Justice HOPKINS' opinion, he referred to the correct ruling on the preemption that had been made on the Attorney General's *remand motion* in the District Court. His footnote related the following (56 A D 2d 310, 320, fn. 3):

"3. The Local removed this action to the District Court for the Eastern District of New York. Upon motion of

the Attorney-General, the action was remanded to the State Supreme Court by the District Court (*State of New York* v. *Local 1115 Joint Bd.*, 412 F Supp 720, 724), saying: 'Whether the Union's preemption contention is correct should be decided as a matter of defense in the State courts in the first instance, see *Application of State of New York, supra,* 362 F. Supp. [922] at 928; *Beacon Moving and Storage, Inc.* v. *Local 814 IBT,* 362 F. Supp. 442, 445 (S. D. N. Y. 1972); *City of Galveston* v. *International Organization of Masters, Mates & Pilots,* 338 F. Supp. 907, 909 (S. D. Tex. 1972), with ultimate recourse to the Supreme Court. State courts are obliged under the Supremacy Clause to follow federal law where applicable and there is no reason to believe that they are unwilling or incapable of so doing, see, e.g., *Pennsylvania* v. *Nelson,* 377 Pa. 58, 104 A. 2d 133 (1954), aff'd. 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956); *State ex rel. Rogers* v. *Kirtley,* 372 S. W. 2d 86 (Sup. Ct. Mo. 1963); *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance,* 849 Mass. 390, 208 N.E. 2d 516 (1965). See also *De Canas* v. *Bica,* 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (2d Dist. 1974), revd. 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).' (See, also, *Barclay's Ice Cream Co.* v. *Local 757,* 41 NY2d 269, *supra.*)"

Unfortunately, in the judgment we seek to review, the same District Court judge lost sight of his earlier correct ruling.

The Union defendants in the State court action took advantage of their right to appeal to the New York Court of Appeals, pursuant to the Appellate Division order granted on April 28, 1977 which, pursuant to the Union's request, allowed them to appeal from the Appellate Division's order of affirmance entered March 14, 1977.

The Union, on June 22, 1977, served its record on appeal *and appellants' brief* on the Attorney General. The Union argued that the Attorney General had failed to comply with

New York State Labor Law, § 807; *and* that "The State of New York, the State Attorney General, the State Commissioner of Health and the State Courts are without Power to regulate the Union's and employee's right to strike", setting forth the "preemption doctrine" and asserting that "state regulation is preempted".

On July 21, 1977, the Attorney General served its *respondent's brief* in which it appears from the headnotes in the State's brief that it argued as follows (pp. 14-28):

> "Special Term properly granted a temporary injunction against a nursing home strike to prevent tremendous suffering to thousands of nursing home residents. The Appellate Division correctly sustained this exercise of discretionary power. That power remained an attribute of state sovereignty which had not been impaired by Congress. When the lives and welfare of patients, its health facilities are in immediate danger, the State is not pre-empted by the provisions of the National Labor Relations Act.
>
> "A. The State's power to protect the health, welfare and safety of its residents has not been preempted by any provision of the National Labor Relations Act. This is a suit by responsible public officials, acting to protect the State's residents, not a suit by or on behalf of an employer.
>
> "B. Labor Law, § 807, does not preclude the Attorney General from maintaining this action nor did it preclude Special Term from exercising jurisdiction to protect the public interest".

On August 1, 1977, the Union defendants served a *reply brief* upon the Attorney General, in which it sought to refute the State's position. On September 7, 1977, the New York Court of Appeals *granted* a motion by District 1199, National Union of Hospital & Health Care Employees,

RWDSU, AFL-CIO, for leave to file a brief *amicus curiae*. A further motion for leave to file an *amicus* brief by *Local 144,* Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO, was denied by the Court of Appeals on October 4, 1977.

On October 4, 1977 defendants' Union Counsel delivered to Assistant Attorney General Daniel M. Cohen, a stipulation *withdrawing* the Union defendants' appeal to the New York Court of Appeals. For the Attorney General, the stipulation was accepted conditioned only upon its being revised to provide for payment to the State of the expense of printing its Court of Appeals brief. On October 7, 1977, Union Counsel delivered a revised stipulation, which provided for the payment of the State's printing bill.

On October 19, 1977, the Court of Appeals, pursuant to the parties' stipulation, entered an order marking the appeal "withdrawn by stipulation". As early as September 29, 1977 (N.Y.L.J. p. 14), the Court of Appeals had listed the case for argument on November 17, 1977.

Clearly, the defendant Union and its employees had abandoned this opportunity to obtain review by the New York Court of Appeals of the state court orders of both the Appellate Division and the Special Term of the Supreme Court.

(4)

The State's injunction action against the Union and its employees had remained dormant from the date of the May, 1976 temporary injunction order, except for the Union's appeals. In the protracted period thereafter, even up to and after the date of the Appellate Division decision, neither the defendant Union *nor the Board moved to modify the temporary injunction nor to vacate it.* See 58 A D 2d 310, 321, footnote 4, where Justice HOPKINS emphasized the fact that the Appellate Division review of the May 1976

Special Term order must be "in the context in which it was made, as shown in and limited by the record on appeal", noting the fact that Special Term was "required to and could act only upon the fact and exigencies which had been presented to it at that time".

Since neither the Union, its employees nor the Board had moved to vacate the May, 1976 temporary injunction order and since the exigencies which merited the Attorney General's action had been dissipated; and since the Union defendants had withdrawn their appeal from the state court orders, the Attorney General moved, by motion returnable October 28, 1977 at the Nassau County Special Term, for an order discontinuing its state court action. This motion was granted, *over the opposition of the defendants* "with prejudice" to the renewal of the action. Special Term's October 28, 1977 order also provided (JA 33*):

> "Within twenty (20) days of service of a copy of this order, defendant may serve a pleading on plaintiff seeking whatever affirmative relief is advised. In the event defendant fails to serve such a pleading, the entire action shall be deemed discontinued without prejudice to defendant's commencing a plenary action seeking whatever relief they choose based on transactions occurring in and related to this action".

Although certain of the statements in the papers in opposition to the State's motion to discontinue the state court action are highly inaccurate, we shall not detail those statements or their errors, either in fact or context. They may have relevance only to whatever further state court litigation the state court defendants may be advised to take. We shall reserve our right to set forth the correct facts when we deem it necessary to do so. Suffice it to

* References to the Joint Appendix are preceded by the letters "JA".

say that, when the state court action was discontinued in 1977, the exigencies which had led to the May, 1976 temporary injunction, had abated.

(5)

Local 1115 had removed the state court action to the District Court for the Eastern District on February 25, 1976, after Special Term had on February 5, 1976 handed down its decision, but before it had entered its May, 1976 temporary injunction order. On April 26, 1976, the Eastern District Court (NEAHER, D.J.) had remanded the action to the State Supreme Court. The District Court's decision in *State of N.Y.* v. *1115 J. Bd., N.H. & H.E.D.* is reported (412 F. Supp. 720) and is referred to in Justice HOPKINS' Appellate Division opinion (56 A D 2d 310, at p. 320, fn. 3)

In remanding the action to the state court, the District Court wrote (412 F. Supp. 720, at p. 273):

> "Here, assuming *arguendo* that State law, which clearly constitutes the gravamen of the Attorney General's complaint, has been preempted, there is no basis for concluding that the Attorney General's claim has therefore been converted into one arising under federal law. Federal law is cast in terms of employers, labor organizations, the National Labor Relations Board and, as concerns health care institutions, the Federal Mediation and Conciliation Service, with primary recourse to the courts severely limited. See *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974); *Boys Market, Inc.* v. *Retail Clerks' Union,* 398 U.S. 235, 90 S. Ct. 1583, 26 L.Ed.2d 199 (1970). *Nowhere in the federal scheme is there a procedure relating to the State, as a party, intervening in a labor dispute* in the *exercise of its police powers".* (Emphasis supplied.)

It continued (412 F. Supp., at pp. 723-724):

> "The Attorney General's right to relief in this action thus depends solely on the continued vitality of State law and does not arise under federal law. As the Court said in *Gully, supra* (299 U.S. 109, 113):
> 'By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co.* v. *Mottley* [211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908)]' 299 U.S. at 116, 57 S.Ct. at 99, 81 L.Ed. at 74."

Judge NEAHER concluded (412 F. Supp., at p. 724):

> "Whether the Union's preemption contention is correct should be decided as a matter of defense in the State courts in the first instance, see *Application of State of New York, supra,* 362 F. Supp. at 928; *Beacon Moving and Storage, Inc.* v. *Local 814, IBT,* 362 F. Supp. 442, 445 (S.D.N.Y. 1972); *City of Galveston* v. *International Organization of Masters, Mates & Pilots,* 338 F. Supp. 907, 909 (S.D.Tex. 1972), with ultimate recourse to the Supreme Court. State courts are obliged under the Supremacy Clause to follow federal law where applicable and there is no reason to believe that they are unwilling or incapable of so doing, see, *e.g. Pennsylvania* v. *Nelson,* 377 Pa. 58, 104 A.2d 133 (1954), aff'd, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956); *State ex rel. Rogers* v. *Kirtley,* 372 S.W.2d 86 (Sup. Ct. Mo. 1963); *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance,* 349 Mass. 390, 208 N.E.2d 516 (1965). See also *De Canas* v. *Bica,* 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (2d Dist. 1974), rev'd, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976)."

It must be noted that a Board representative participated in the oral argument of the motion to remand. The District Court later (in its August 22, 1977 decision, JA 27,

fn. 4) did not deem this "minimal" participation to foreclose the Board from proceeding with the present action, citing as authority *United States* v. *California,* 381 U.S. 139, 175 n.49 (1965).

The final footnote in Judge NEAHER's 1976 opinion supplied this significant emphasis (412 F. Supp. 720, 724, fn. 8):

> "Nor can it be said that remand is improper because if State law is preempted the State court has no subject matter jurisdiction. The preemption question raised *here* concerns itself with which body of substantive law, federal or State, governs, not which judicial system has subject matter jurisdiction. State courts retain jurisdiction in labor matters, even if federal law is to be applied. *Charles Dowd Box Co., Inc.* v. *Courtney,* 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962), affirming 341 Mass. 337, 169 N.E.2d 885 (1960). The situation is different if Congress explicitly vested exclusive jurisdiction in the federal courts, e.g., 28 U.S.C. § 1338."

(3)

The chronology of the administrative proceedings engaged in by *the employers and the Union* is conveniently set forth in the opinion by Justice HOPKINS (56 A D 2d 310, 320-321, fn. 4). Charges were filed with NLRB on or about December 19, 1975. The regional office took *no action* in the dispute except, on December 30, 1975, asking for a reply by the employers' association. Consolidated amended charges were filed on May 3, 1976 against the employers. The unfair labor practice charges were tried before an Administrative Law Judge on June 22 and 23, 1976.

At the time of the argument before the Appellate Division, the Administrative Law Judge had not yet rendered a decision. In fact, the decision was not rendered until November 18, 1976; and it was not until January 28, 1977

that the Board adopted his decision, finding the employers guilty of unfair labor practices and directing them to cease and desist and to take specified affirmative action.

As Justice HOPKINS noted, the record did not show that during the protracted period in which the charges were pending before the Board, the latter did "move to oppose or to vacate the temporary injunction issued by the State court which would indicate that the Board was content to let the temporary injunction stand" (56 A D 2d 310, 321 fn. 4). Nor did the Union seek to vacate or annul the State court temporary injunction because the strike threat had abated or for any other reason.

Incidents of This Action

The complaint in this action, dated August 23, 1976, was filed on September 8, 1976. On October 8, 1976 notice was served of a motion for a *preliminary* injunction, returnable November 11, 1976. The State's opposition to the motion was filed on November 1, 1976. The plaintiff's time to reply was extended to November 26, 1976; and such reply was filed on November 29, 1976. Not until August 24, 1977, did Judge NEAHER decide the motion in plaintiff's favor, but directed settlement of an order on the decision "on notice". No order was entered upon the August 22, 1977 decision, until March 23, 1978, when Judge NEAHER signed an order granting a preliminary injunction to the NLRB. The State promptly appealed to the Second Circuit by notice of appeal dated March 30, 1978.

NLRB alleged, in its action pursuant to 28 U.S.C. §§ 2201 and 2202, that certain actions taken by the State Attorney General and State Commissioner of Health were invalid because "said actions" are within "the exclusive jurisdiction of the National Labor Relations Board and preempted by the National Labor Relations Act" (JA 4, 5).

In support of such allegation, NLRB further alleged that the Union had entered into collective bargaining agreements with the employer nursing homes and their Association, effective January 1, 1975 through December 31, 1978, which contained a no-strike provision, but which, nevertheless, contained a provision giving the Union a right to strike and remove employees until the employer paid certain monthly sums into a Welfare Trust Fund (JA 6); that since December 15, 1975, the Union had been engaged in a labor dispute with the Employers and the Association, because the latter stated they would be unable to pay certain increases to the payroll Welfare Trust Fund and Legal Service Fund due January 1, 1976 (JA 7); that, on December 30, 1976, the Union filed unfair labor practice charges with Region 29 (Brooklyn) of the NLRB, seeking issuance of a complaint against the Association and the Employers (JA 7, 8); that on January 7, 1976, the Union notified the Federal Mediation and Conciliation Service, the Association and the Employers of its intent to strike on January 21, 1976; that the Commissioner of Health issued his orders of January 19 and 21, 1976, directing the Union not to strike and take certain other action (JA 8-9); and that the Attorney General, on January 21, 1976, instituted its state court action seeking a preliminary injunction (JA 9).

Next, the petition recited the granting, in the state court, of a temporary restraining order on January 21, 1976, enjoining any strike action (JA 9-10); the granting of the preliminary injunction on February 5, 1976, pending a hearing and determination of the State's complaint; and the fact that there had been no hearing on the State's complaint for a permanent injunction (JA 10).

The complaint then recited the fact that the Union had petitioned, on February 25, 1976, for removal of the state court action to the United States District Court, arguing that New York was "seeking to enjoin activities which are

exclusively regulated by the NLRA" (JA 10); but that on April 23, 1976, District Judge NEAHER granted the State's motion to remand (JA 10).

The complaint then referred to the fact that on May 3, 1976, the Region 29 Regional Director, pursuant to the Union's charge, had issued a "consolidated amended complaint . . . against the Association and the Employers alleging they had committed unfair labor practices in violations of Sections 8(a)(5) and (1) of the Act"; that a hearing on the complaint had been held on June 22 and June 23, 1976, but no decision had been yet issued (JA 10-11).

The complaint concluded with allegations that the Commissioner of Health's orders of January 19 and 21, 1976 constituted an attempt to regulate conduct preempted by the NLRA, committed to the *exclusive* jurisdiction of the NLRB; and were invalid under the Supremacy Clause; and that state court action constituted a similar attempt; wherefore, temporary injunctive relief was sought against the State defendants (JA 11-12).

Apart from certain denials, the State in its answer, dated October 26, 1976, set forth certain affirmative defenses. It referred to the remand order of April 23, 1976, which referred the preemption issue, among others, to the state courts for determination; and asserted, in addition, the State's right to procure injunctive relief by the state court order "as a valid exercise of the powers of the State of New York to protect the lives and health of its citizens" (JA 17-18).

The District Court's Memorandum, Dated August 22, 1977 (JA 19-26)

(1)

More than a year after the District Court remanded the state court action to the state court (on April 23,

1976), with the statement that "State Courts are obliged under the Supremacy Clause to follow federal law *where applicable* and there is no reason to believe that they are unwilling or incapable of so doing"; and more than five months after the Appellate Division decision of March 14, 1977, rejecting the Union's preemption argument in a 3-2 decision, the District Court granted the NLRB's Oct. 1976 motion for a temporary injunction, setting forth its revised and distorted conception of the applicability of the pre-emption doctrine.

The only *facts* not heretofore set forth relied upon by the District Court were that "on June 22-23, 1976, an administrative law judge found the employers guilty of unfair labor practices; and ordered them to cease and desist," an order which was adopted by the NLRB on January 28, 1977 (JA 21).

(2)

The District Court decided the preemption issue upon the basis of *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 244 (1959) and *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25,* 97 S. Ct. 1056 (1977). While recognizing the State's "primary concern is to protect and promote the health of its inhabitants", the District Court concluded that the State's preliminary injunction directly interferes with the union's right to strike", citing *Automobile Workers* v. *O'Brien,* 339 U.S. 454, 457 (1950).

(3)

Judge NEAHER depended on the 1974 amendment of the NLRA (29 U.S.C., § 152[14]) which extended coverage of the Act to some 1,400,000 employees of "health care institutions"; and which required them to give 10 days notice of their intent to strike, 29 U.S.C., § 158(g); and upon Congressional debate as to the impact of the 1974 amendments

on state *labor* jurisdiction (JA 24); but cited a 1972 law review article as to the applicability of NLRA, § 7, to "essential public services" (JA 25).

(4)

Judge NEAHER finally decided that, *despite the general prohibition against the use of federal injunctions to interfere with state court proceedings,* the decisions in *N.L.R.B.* v. *Nash-Finch Co.,* 404 U.S. 138, 144 (1971) and in *Mitchum* v. *Foster,* 407 U.S. 225, 235-36 (1972) sustained "the implied authority to enjoin State proceedings where federal power preempts the field" (JA 25). Despite this decision, he sought to open the door to other protective action by the State. He wrote (JA 25-26):

> "Given the vulnerable state of the residents of nursing homes should there be a cessation of services by those who are charged with their care, note must be taken that NLRA supremacy over the *economic* rights of unionized employees does not strip the State of its residual powers to protect the lives and health of those residents. While the State may not prohibit the employees from going out on strike or engaging in peaceful picketing, when it appears that the lives and health of nursing home residents are threatened, the State remains free, in the exercise of its local responsibility, to take whatever reasonable steps are necessary to protect the residents from the effects of strike activity.
>
> At this juncture, however, the court need only decide that State regulation of the right of nursing home employees to strike is preempted by the NLRA as amended. Acordingly, the NLRB's motion for a preliminary injunction is granted. Settle form of order on notice."

The Proceedings Upon the Settlement of the District Order

Settlement of an order based upon the August 22, 1977 decision produced further conflict between the State and NLRB counsel. The latter sought to enter a *final* judgment predicated upon its motion for a temporary injunction, to which the Attorney General objected. See the docket entries, from September 6, 1977 to September 12, 1977.

On September 20, 1977, a conference was held before Judge NEAHER, attended by NLRB counsel, union counsel and the Attorney General's representative. The Attorney General requested the Court not to sign the order presented by NLRB, pursuant to his September 12, 1977 objections. The Court granted that request.

On December 9, 1977, a further conference was held before Judge NEAHER, at which the defendants presented their motion to dismiss this action as moot, in view of the Union's withdrawal of its appeal to the New York Court of Appeals and the dismissal of the state court action on November 16, 1977; and in view of the fact that there no longer existed a case or controversy between the State court parties (JA 28-31).

At this point, we must call attention to the fact, recognized even in Judge NEAHER's opinion of August 24, 1977 that the *NLRB* had reported to him (JA 27, fn. 3):

> "That since the preliminary injunction was issued, the employers have made the required payments into the welfare and legal service funds, thereby removing the immediate threat of a strike."

The State's Motion to Dismiss (December 9, 1977)

The State's December 9, 1977 motion to dismiss on the ground of mootness set forth the discontinuance of the State court action in which the preliminary injunction had

been obtained, whose enforcement the NLRB sought to prevent; and emphasized that, since there no longer existed a case or controversy, it would be improper for the District Court to enter an order predicated upon its August 23, 1977 decision, since the State court order no longer existed and the Health Department orders were no longer effective. The State urged (JA 31):

> "There is no justiciable issue between the parties hereto. A decision on any hypothetical future set of facts should await the time such facts exist, if ever, and should not be rendered now on the basis of the hypothetical situations which the N.L.R.B. may now envision."

The State court order discontinuing the State court action annexed to the motion had even discontinued the State court action "with prejudice to its renewal" (JA 33).

The December 9, 1977 Conference Before the District Court

This conference amounted to an argument concerning the issue of mootness. No testimony was taken. The NLRB urged that there was a continuing threat by the State to proceed in precisely the same way to go back into the State court to seek to enjoin strikes or peaceful picketing (JA 55). The Attorney General refused to speculate as to what the State would do "the next time" (JA 56). He emphasized the NLRB's inaction at the outset of the labor dispute involved in this action (JA 56); as he did the Union's failure to test the issues that should have been controlling under the circumstances of *this case* in the New York Court of Appeals (JA 56).

The Attorney General also stressed the fact that the *strike* here involved had been settled when this action was instituted; that the union was not justified in sitting back in the state court action and not making a motion to vacate or annual the temporary injunction there ob-

tained as no longer necessary (JA 57). Under the circumstances, the Attorney General urged that there was no justification for the District Court to sign an order which would "interfere or attempt to interfere with the State Court proceedings which have been concluded or State Court proceedings that might under some vague set of circumstances be commenced in the future" (JA 57-58).

The Assistant Attorney General, as a person temporarily in office, declined to bind "any other Assistant Attorney General, or the Attorney General of the State or any future Attorney General from taking whatever action he deems appropriate or necessary in the protection of the public health and exercise of the police power in the future" (JA 58).

Union counsel was permitted to enter into the discussion before Judge NEAHER. There can be little doubt that the union and NLRB have been acting in unison. It is, therefore, not surprising that the union supported the NLRB position. At most, the union's counsel stated, as a fact in support of this argument against a "mootness" disposition, that *one employer* had failed to make delinquent payments (JA 59).

The District Court observed the fact that the State court order of discontinuance was "without prejudice to the defendants [in that action] commencing a plenary action seeking whatever relief they chose" (JA 60).

The District Court Order and Memorandum, Dated March 23, 1978

The District Court declined to follow the decision of the District of Columbia Circuit in *Washington Metropolitan Area Transit Authority* v. *Amalgamated Transit Union,* 531 F. 2d 617, 620 n. 5 (D.C., 1976) to apply, in a labor dispute, "principles of common law mootness and decline to decide issues that are not at present alive".

Based upon what "the union" stated, the Court concluded that the case was "not moot". This basis for the Court's decision is revealed in its statement (JA 64):

> "The collective bargaining agreement in effect at the time of the strike threat in early 1976 will remain in effect until December 31, 1978. This contract reserves to the union the right to strike if any of the nursing home employers are delinquent in their required payments to certain funds. The union maintains that there are present delinquencies in such payments and a substantial likelihood of future delinquencies. Should the union exercise its right to strike as a result of these delinquencies, there is a distinct possibility that the State may institute an action in State court to enjoin the strike."

The Court concluded (JA 64-65):

> "The Board has made the required showing that 'there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.' United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).
> The State court's dismissal of the action before it as moot does not bar a contrary conclusion by the court as to the present action. Liner v. Jafco, Inc., 375 U.S. 301, 304 (1964). Nor does the State's successful request to discontinue its action in the State court render the case moot, for '[v]oluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.' Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944). This is particularly so in a case such as this where it is vitally important to prevent State injunctions from frustrating federal labor policy. Liner v. Jafco, Inc., supra, 375 U.S. at 307-08."

Reason for Granting the Writ

(1)

The conflict between the New York Appellate Division decision and that of the District Court warrants resolution by this Court. After first recognizing on the remand motion that the issue of preemption should be passed upon by "the State courts in the first instance, with ultimate recourse to the Supreme Court" (412 F. Supp. 720), the District Court erroneously reversed its reasoning, five months after the New York Appellate Division decision on March 14, 1977 that the State had *not* been preempted. The District Court then announced in its memorandum decision of August 24, 1977 decision that federal power had preempted the field.

The August 22, 1977 decision constituted an egregious display of disrespect for the state judicial system since the New York Appellate Division had on April 28, 1977 granted the Union leave to appeal to the New York Court of Appeals. The Union had taken advantage of such permission by serving its record on appeal and appellant's brief on June 22, 1977; the Attorney General responded on July 21, 1977; and the Union had served a reply brief on the Attorney General on August 1, 1977 in which it sought to refute the State's position before the New York Court of Appeals. Indeed, New York's Court of Appeals on September 7, 1977 permitted another union (District 1199) permission to file an *amicus* brief in support of Local 1115's position. Clearly, there was no need for the District Court's intervention at that time. As early as September 29, 1977 (New York Law Journal, p. 14) the Union's case was listed for argument in the New York Court of Appeals on November 17, 1977.

In the light of the reviewability by the New York Court of Appeals of the issue of preemption, with the possibility of ultimate review by this Court, the August, 1977 decision

by the District Court constituted an arrogant and unnecessarily erroneous display of federal power in favor of a federal agency in a forum of its choice. This federal judicial intervention was particularly obnoxious since the District Court itself recognized that the employers, according to an NLRB report, were making the required payments into the welfare and legal service funds and there was no "immediate threat of a strike" (JA 27, fn. 3). The New York Court of Appeals could reasonably have been expected to follow federal law where applicable.

(2)

The District Court depended, in its August 22, 1977, decision, upon *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971), to give "implied authority" to NLRB "to enjoin State proceedings where federal power preempts the field" (JA 25). But *Nash-Finch* does not offer any sound justification for a conclusion that the powers of the State Commissioner of Health to declare a health emergency and to secure injunctive relief to prevent a strike which threatened to create or exacerbate that emergency were preempted by the NLRA, as amended. The administrative foot-dragging of NLRB procedures, so well illustrated by the delays in the instant case, clearly reveal that a vacuum exists in which state power to act must remain if the sick, disabled and aged housed in nursing homes are not to be deemed the abandoned victims of a federal bureaucracy.

The vice of the District's judgment should be more apparent when it is recognized that even in *Nash-Finch*, where it was noted that federal courts were the forum of choice for federal agencies, Justice DOUGLAS left open on remand the question of whether the State court action there involved should be sustained in part.

Neither do *San Diego Building Trades Council* v. *Garmon*, 359 U. 236, 244 (1959) nor *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), upon which the District Court also depended, warrant a conclusion that the State Commissioner of Health has been divested of his powers to enjoin action which threatens the public health and safety.

Nash-Finch, *Garmon* and the *Farmer* case have all recognized the limitations of the preemption doctrine. This fact was underlined by Justice STEVENS, in his opinion for this Court, in *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (May 15, 1978), when he wrote (pp. 187-189):

> "In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, the Court made two statements which come to be accepted as the general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of state regulation of activity touching upon labor-management relations. The first related to activity which is clearly protected or prohibited by the federal statute.[11] The second articulated a more sweeping prophylactic rule:
>
> > 'When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.' *Id.*, at 245.
>
> While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor preemption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.[12] As the Court noted last Term:
>
> > 'Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of

> the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.' *Farmer* v. *Carpenters,* 430 U.S. 290, 302.
>
> Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion.[13] This refusal demonstrates that 'the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies' of permitting the state court to proceed. *Vaca* v. *Sipes,* 386 U.S. 171, 180.[14]"

In a footnote to this statement, Justice STEVENS emphasized (436 U.S. 180, 188, fn. 13, at p. 189):

> "The Court's rejection of an inflexible pre-emption approach is reflected in other situations as well. Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the *Garmon* rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co.* v. *Marine Engineers,* 382 U.S. 181. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to 'compelling precedent applied to essentially undisputed facts,' *San Diego Building Trades Council* v. *Garmon,* 359 U.S., at 246, the court may properly do so and proceed to adjudicate the state cause of action. Permitting the state court to proceed under these circumstances deprives the litigant of the argument that the Board should reverse its position, or, perhaps, that precedent is not as compelling as one adversary contends."

In *Sears,* this Court held that neither under the "arguably protected" or "arguably prohibited" branch of the

Garmon doctrine prevented the California state courts from exercising jurisdiction limited to the trespassory aspects of the Union's picketing. We submit that *Sears* warrants an inquiry into the propriety of the autocratic declaration in the August 22, 1977 memorandum and the District Court's March 23, 1978 decree that the state courts were preempted of jurisdiction to pass upon the interrelationship of the NLRA to the Commissioner of Health's exercise of the powers conferred upon him by the New York statutes and the New York Constitution.

As Justice STEVENS further noted in *Sears* (436 U.S. 180, 197):

> "The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.[27]"

He continued (p. 198):

> "In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred.[28] Conversely, in the state action, Sears only challenged the

> location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices."

Upon the argument in the Second Circuit, NLRB made the astonishng assertion that the Commissioner of Health could have filed a "charge" with the NLRB. Even *if* this might have been factually correct, the Court need not be unrealistic enough to disregard the peril such a procedure would create for bed-patients awaiting the slow-grinding processes of the NLRB. There remains a standard for leaving to each sovereign state "its historic powers over such traditionally local matters as public safety and order." *Allen-Bradley Locals* v. *Wisconsin Emp. Rel. Board,* 315 U.S. 740, 749 (1942).

We need not be blind to the fact that strike action may involve trespassory acts or aspects which may affect lives as well as the physical premises affected in the *Sears* case. The "costs inherent in a jurisdictional hiatus" to be preferred to "the frustration of national labor policy which might accompany the exercise of state jurisdiction" would not be exceptionally high if they were assessed at the cost of patients' lives. We doubt that this Court will impose such an assessment either upon the NLRA, as amended in 1974, or upon any interpretation of its prior preemption decisions.

As a matter of fact, the State Commissioner of Health may have had as little right to file charges with the NLRB as did Sears. Counsel for NLRB orally argued before the Second Circuit that any person could file charges with the NLRA. But neither the State, the Attorney General, nor the Commissioner of Health were parties to a labor dispute.

In *Sears,* Justice STEVENS held that "Sears had no right to invoke that jurisdiction" (436 U.S. 180, 207). Accordingly, Justice STEVENS concluded, for the Court (436 U.S., at 207):

> "Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.""

(3)

We submit that the *Sears* decision indicates that the courts below have misapplied the pre-emption doctrine. It clearly demonstrates the limitations upon *Nash-Finch* which were disregarded by the District Court and the Second Circuit. See also *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 289, 317, 329 (1971). And see *Uphaus* v. *Wyman,* 360 U.S. 72 (1959); *DeGregory* v. *New Hampshire Attorney General,* 383 U.S. 825, 828 (1966); and *People* v. *Epton,* 19 N.Y.2d 496 (1967), app. dism. 390 U.S. 29 (1968).

(4)

The State's motion to dismiss this action as moot should have been granted. When the motion was made in December, 1977, there no longer remained any state court order whose enforcement could be enjoined. The injunctive relief was predicated upon an exceptionally flimsy basis—the refusal of an Assistant Attorney General to predict whether the State would resort to state court action under some vaguely described hypothetical set of facts in the future (JA 64). Certainly the Assistant Attorney General, an appointee at will of an elected public official had no authority to predict what action any Commissioner of Health or some future Attorney General would deem it to be that officer's

duty to pursue in the state courts. We submit that there remained no substantial basis for federal court action and that the complaint in this action should have been dismissed. If a dictum was warranted, the Court should have opted for public safety.

(5)

The issues of preemption and federalism had been presented to a state appellate court. The District Court should not, in effect, have sat "in review" of that state court decision. *Lamb Enterprises* v. *Kiroff*, 549 F. 2d 1052 (6th Cir., 1977). There was no longer a case or controversy pending in the state courts, in fact, for the District Court to pass upon.

Advisory opinions have been frowned upon and refused since the Supreme Court unanimously refused in 1793 to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out of the wars of the French Revolution. 1 C. Warren, The Supreme Court in United States History (Boston: rev. ed. 1926), 108-111.

At the December, 1977, hearing the Assistant Attorney General could have professed only to make a *recommendation* to his superior or successor. Such a recommendation itself would not have been the proper subject for judicial review. As stated by Justice JACKSON, in *Chicago & S. Airlines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113-114 (1948), when the Court refused to review an order of the Civil Aeronautics Board, which was, in effect, a mere *recommendation* to the President for his *final* action:

> "To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Hayburn's* Case, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U.S. 697; *In re Sanborn*, 148 U.S. 222; *Interstate Commerce Commissioner* v. *Brimson*, 154 U.S. 447; *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423; *Muskrat* v. *United States*, 219 U.S. 346; *United States* v. *Jefferson Electric Co.*, 291 U.S. 386."

Here the Assistant Attorney General had not even made a recommendation to the Attorney General; and was not even prepared to make any recommendation upon the basis of prospective, uncertain and indefinite factual eventualities. Indeed, the District Court can be charged with seeking to reconstitute a case or controversy out of the Assistant Attorney General's *refusal to make a recommendation* as to action that should or might be taken in some future inchoate dispute. *Cf. Clark* v. *Valeo*, 559 F.2d 642, 676, fn. 100, as to the impropriety of Courts being asked to act upon facts "neither present nor apparently incipient".

Assertion in either the state or federal court that the State had not abdicated or been divested of its police power did not warrant the District Court in 1978 in assuming that there remained before it a case or controversy in substantially the same form and subject to the same contentions that were presented to the Special Term of the State Supreme Court in 1976. See *A.L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961). Elected Attorneys General modify the practices of their predecessors. So, too, do appointed Commissioners of Health.

The District Court should not have engaged in a guessing game. Nor should such a burden have been placed upon the Attorney General's representative. Neither declaratory judgment nor injunctive relief should have been predicated upon a hypothetical basis. *O'Shea* v. *Littleton*, 414 U.S. 488, 496-505 (1974), *supra; Rizzo* v. *Goode*, 423 U.S. 326 (1976); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

Conclusion

Wherefore, petitioner requests that a writ issue to the United States Court of Appeals for the Second Circuit to review its November 13, 1978 judgment.

Dated: New York, New York
December 10, 1978

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the State
of New York
Attorney for the Petitioners
By Daniel M. Cohen
Assistant Solicitor General
Member of the Bar of the
Supreme Court of the United States

APPENDIX

APPENDIX

Exhibit A, Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of November, one thousand nine hundred and seventy eight.
Present:

HON. STERRY R. WATERMAN

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. CHARLES P. SIFTON
District Judge
Sitting by Designation.

Dkt. No. 78-6050

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee,

v.

STATE OF NEW YORK, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York and ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York,

Defendants-Appellants.

Exhibit A, Judgment of Affirmance.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* on the opinions of Judge Neaher dated August 22, 1977 and March 23, 1978.

Sterry R. Waterman
Sterry R. Waterman
United States Circuit Judge

Wm. H. Timbers
William H. Timbers
United States Circuit Judge

Charles P. Sifton
Charles P. Sifton
United States District Judge
Sitting by Designation

Exhibit B, Memorandum and Order, dated March 23, 1978.

Appearances:

Carl L. Taylor, Esq.
Associate General Counsel,
National Labor Relations Board
Attorney for Plaintiff

By Janet C. McCaa, Esq. and
Margery E. Lieber, Esq.

and

Harold L. Richman, Esq.
Regional Attorney, Region 29
National Labor Relations Board

Louis J. Lefkowitz, Esq.
Attorney General of the State
of New York
Attorney for Defendants

By Daniel M. Cohen, Esq. and
Jesse P. Reisner, Esq.

Neaher, District Judge.

In a Memorandum and Order dated August 22, 1977, the court declared that State regulation of the right of nursing home employees to strike is preempted by the national Labor Relations Act ("NLRA"), as amended, and granted the motion of the National Labor Relations Board ("Board") for an order preliminarily enjoining the enforcement of State orders prohibiting such employees in Nassau and Suffolk Counties from exercising their right to strike. Prior to settlement of the form of the order, the State of New York discontinued its action in State court, where it had been granted a preliminary injunction against

a strike by the nursing home employees, and then moved to dismiss the present action as moot. The Board opposes the motion to dismiss and seeks instead an order giving effect to the court's decision of August 2, 1977.

As detailed in that opinion, the procedural background of this case is complex. When Local 1115, Joint Board, Nursing Home and Hospital Employees Division ("union") announced its intent to strike beginning January 21, 1976, the State Commissioner of Health issued orders prohibiting the union from striking and the State Attorney General applied to the Supreme Court, Suffolk County, for injunctive relief. On January 21, 1976, the State court granted the State a temporary restraining order, and on February 5, 1976, it granted a preliminary injunction against any strike action. On February 20, 1976, the union removed the action to this court, which granted the State's motion to remand on April 23, 1976, on the ground that the complaint stated a claim solely under State law. The union then appealed the granting of the preliminary injunction to the Appellate Division, Second Department, which affirmed in a 3-2 decision on March 14, 1977. While the union's next appeal was pending in the New York Court of Appeals, the Board commenced this action and this court issued its opinion of August 22, 1977, granting the Board's motion for a preliminary injunction against further prosecution of the State court action against the union.

Subsequent developments have kept this case on its unusual course. The union sought leave from the New York Court of Appeals to withdraw its appeal, the State agreed to the withdrawal, and the Court of Appeals dismissed the appeal on October 19, 1977. The State then moved to discontinue as moot its action against the union in Supreme Court, Suffolk County. On November 16, 1977 the State's motion was granted and the action was dismissed with prejudice. The present motion to dismiss followed.

The State contends that this action is moot because the underlying dispute between the union and the nursing home has been settled and the State has discontinued its action to enjoin a strike by the union. It asks that the court follow a recent decision by the District of Columbia Circuit, which dismissed an appeal from a preliminary injuction as moot with the following statement:

> "In constitutional terms a court in a labor dispute may act on issues that are capable of repetition. Nevertheless the court in such cases may apply principles of common law mootness and decline to decide issues that are not at present alive." *Washington Metropolitan Area Transit Authority* v. *Amalgamated Transit Union,* 531 F.2d 617, 620 n. 5.

The Board, on the other hand, urges the court to deny the motion to dismiss and to issue injunctive relief because of the likelihood of repetition of the State's conduct which the Board is seeking to enjoin. The collective bargaining agreement in effect at the time of the strike threat in early 1976 will remain in effect until December 31, 1978. This contract reserves to the union the right to strike if any of the nursing home employers are delinquent in their required payments to certain funds. The union maintains that there are present delinquencies in such payments and a substantial likelihood of future delinquencies. Should the union exercise its right to strike as a result of these delinquencies, there is a distinct possibility that the State may institute an action in State court to enjoin the strike. The State has refused to stipulate that it would comply with this court's decision of August 24, 1977, and at the most recent conference before this court the Assistant

Attorney General stated that "the question as to what the State will do the next time depends on the circumstances and all the facts surrounding the situation that develops in the State 'the next time.'" Tr. of December 9, 1977 Conference at 9.

Under these circumstances, the court finds that the case is not moot and that injunctive relief is appropriate. The Board has made the required showing that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

The State court's dismissal of the action before it as moot does not bar a contrary conclusion by the court as to the present action. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304 (1964). Nor does the State's successful request to discontinue its action in the State court render the case moot, for "[v]oluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944). This is particularly so in a case such as this where it is vitally important to prevent State injunctions from frustrating federal labor policy. *Liner* v. *Jafco, Inc., supra*, 375 U.S. at 307-08.

Therefore, the court denies the State's motion to dismiss and grants the Board's request for the issuance of an order giving effect to the court's decision of August 22, 1977. In accordance with that opinion, the order, which will issue separately on this date, will contain a preliminary, rather than a permanent, injunction, despite a stipulation signed by an Assistant Attorney General stating that "the material facts are not in dispute . . . and . . . *all* issues raised by plaintiff's complaint are ripe for determination at this time" (emphasis added). The authority of the Assistant

Attorney General to enter into the stipulation, which is dated November 10, 1976, has been questioned by his Bureau Chief in a letter dated September 8, 1977. Consequently, only preliminary relief is appropriate at this time.

So Ordered.

/s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
March 23, 1978

Order.

Plaintiff's motion for a preliminary injunction having come before the court, and the parties having been heard, and the court having granted the motion in an opinion dated August 22, 1977, it is

ORDERED and DECLARED that State regulation of the right of nursing home employees to strike is preempted by the National Labor Relations Act, as amended, and is committed by Congress to the exclusive jurisdiction of the National Labor Relations Board; and it is further

ORDERED that defendants are preliminarily enjoined from:

(a) in any manner issuing or seeking to enforce administrative notices, regulations or orders, including two orders issued against Local 1115, Joint Board, Nursing Home and Hospital Employees, on January 19 and 21, 1976, which prohibit, restrain or regulate, or seek to prohibit, restrain or regulate conduct of nursing home employees which is governed exclusively by the National Labor Relations Act;

(b) in any manner instituting or prosecuting any State court action for the purpose of enjoining, regulating or restraining conduct of nursing home employees which is governed exclusively by the National Labor Relations Act; and

(c) in any like or related manner attempting to regulate conduct of nursing home employees which is governed exclusively by the National Labor Relations Act and is within the exclusive jurisdiction of the National Labor Relations Board.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
March 23, 1978

Exhibit C, Order of Withdrawal.

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Nineteenth day of October, A. D. 1977.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

State of New York,

Respondent,

vs.

Local 1115, Joint Board, Nursing Home and Hospital Employees Division, Alex De Laurentis, Vice President and John Doe and Mary Roe, names being fictitious &c.,

Appellants.

On reading and filing the annexed consent, it is

ORDERED, that the appeal taken by the appellants in the above cause to this Court be and the same hereby is withdrawn.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Exhibit C, Order of Withdrawal.

STIPULATION OF WITHDRAWAL OF APPEAL

COURT OF APPEALS
OF THE STATE OF NEW YORK

STATE OF NEW YORK,

Plaintiff-Respondent,

—against—

LOCAL 1115, JOINT BOARD, NURSING HOME AND HOSPITAL EMPLOYEES DIVISION, ALEX DE LAURENTIS, VICE PRESIDENT and JOHN DOE and MARY ROE, names being fictitious and intended to describe all persons acting in concert or participation with the foregoing defendants,

Defendants-Appellants.

IT IS HEREBY STIPULATED, consented to, and agreed, by and between the attorneys for the Defendants-Appellants and the Plaintiff-Respondent, pursuant to Rule 500.14 of the Rules of the Court, that the above named appeal, scheduled for argument before the Court on November 17, 1977, be and the same is hereby withdrawn upon payment by the Appellants of the cost of printing Respondent's brief.

Dated: New York, New York
October 6, 1977

CHARLES R. KATZ, P. C.
Charles R. Katz, P. C.
Attorney for Defendants-Appellants

LOUIS J. LEFKOWITZ
Louis J. Lefkowitz, Attorney-General
of the State of New York
By Daniel M. Cohen, Assistant Attorney General
DANIEL M. COHEN